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# THE 2000 DRAFT OF UCC ARTICLE 2: PART SIX ON BREACH, REPUDIATION, AND EXCUSE

*Christina L. Kunz\**

**I**N the continuing redraft process of Article 2 of the Uniform Commercial Code (U.C.C.), the 2000 Annual Meeting draft<sup>1</sup> was the most recent work product at the time this article was written. It was drafted for consideration at the 2000 annual meeting of the National Conference of Commissioners on Uniform State Laws (NCCUSL).<sup>2</sup> This article will refer to the existing U.C.C. as the “current Code” and to the 2000 Annual Meeting draft as the “2000 draft.” The 2000 draft is carefully drafted and well balanced. Its changes are needed to enable U.C.C. Article 2 to guide and facilitate commercial law during the next half-century.

Part Six of Article 2 deals with breach, repudiation, and excuse in the sale of goods. It is closely related to—and sometimes intertwined with—the performance provisions of Part Five. In other respects, Part Six is a close cousin to Part Seven’s remedies because it sets out many rights and responsibilities of the aggrieved party. In the 2000 draft, Part Six has been revised to clarify buyer’s post-rejection duties and rights; buyer’s reasonable use of goods after rejection or revocation; buyer’s failure to particularize after revocation; notice of breach as to accepted goods; installment contracts; anticipatory repudiation; contract avoidance, termination, and lapse; and the scope of the impracticability excuse. These changes are minor and mostly follow existing case law or common sense. In general, Part Six has been a source of little controversy during the revision process.

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1. The text and comments of the July 2000 draft and other drafts can be found at <http://www.law.upenn.edu/bll/ulc/ulc-frame.htm>.

2. For the current status of NCCUSL uniform acts in the legislatures, as well as other current information, see <http://www.nccusl.org>.

## A. BUYER'S POST-REJECTION DUTIES AND OPTIONS

Sections 2-602, 2-603, and 2-604 set out buyer's post-rejection duties and options. In the current Code, the captions limit each section to "rightful rejection."<sup>3</sup> However, this approach leaves unanswered the question of what duties the buyer has as to goods rejected wrongfully but effectively. The sensible solution is to apply many of these post-rejection duties and options to all effective rejections,<sup>4</sup> both wrongful and rightful. The 2000 draft accomplishes that result by changing the captions of these sections to apply to "rejection," rather than only "rightful rejection."<sup>5</sup> Thus, if buyer effectively rejects the goods (rightfully or wrongfully) by seasonably notifying seller of rejection, buyer has a duty to hold any goods in its possession with reasonable care at seller's disposition,<sup>6</sup> sometimes has a duty to make reasonable efforts to resell the goods or to follow seller's reasonable instructions,<sup>7</sup> and otherwise has the options of resale, storage, or reshipment.<sup>8</sup>

The 2000 draft then accordingly limits buyer's right to indemnity or reimbursement for expenses under Section 2-603(a) and (b) to rightfully rejected goods:

- (a) Subject to any security interest in the buyer under Section 2-711(c), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in its possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. *In the case of a rightful rejection* instructions are not reasonable if on demand indemnity for expenses is not forthcoming.
- (b) When the buyer sells goods under subsection (a) *following a rightful rejection*, the buyer is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding 10 percent on the gross proceeds.<sup>9</sup>

Thus, in both (a) and (b), the buyer who rightfully rejects is mitigating its own damages and is entitled to recover the expenses of mitigation, which also might well be recoverable as incidental damages.<sup>10</sup> However, the buyer who wrongfully but effectively rejects is (by implication)<sup>11</sup> not

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3. U.C.C. §§ 2-602 to -604 (1999).

4. Recall that an ineffective rejection is an acceptance. U.C.C. § 2-606(1)(b) (1999); U.C.C. § 2-606(a)(2) (2000 draft).

5. U.C.C. §§ 2-602 to 2-604 (2000 draft).

6. *Id.* § 2-602(b)(2).

7. *Id.* § 2-603(a).

8. *Id.* § 2-604.

9. *Id.* § 2-603(a), (b) (emphasis added).

10. U.C.C. § 2-715(1) (1999) (defining incidental damages).

11. The Reporter's Notes state that the "text has been modified to make it clear that a buyer is not entitled to indemnity for expenses (subsection (a)) or to a commission (subsection (b)) following a wrongful rejection." U.C.C. § 2-603 Reporter's Notes (2000 draft).

entitled to indemnity or reimbursement because the breaching buyer has no right to any damages, but instead is responsible for seller's resale<sup>12</sup> or market damages<sup>13</sup> or, in special cases, the price.<sup>14</sup> The higher the buyer's resale price, the less buyer's damages will be, if the seller chooses to use (or must use) resale as the basis for calculating damages;<sup>15</sup> if so, the wrongfully rejecting buyer has an incentive to sell the goods for as high a price as possible.

Of course, the wrongfully rejecting buyer, at the time of resale, often believes that it is in the right, so it might well demand that seller include indemnity for expenses in its instructions under Section 2-603(a). If the seller refuses to do so because it believes, correctly, that buyer is in the wrong, buyer might erroneously conclude that seller's instructions are "not reasonable" under the last sentence in (a) and therefore refuse to follow those instructions, even though later facts show that buyer was indeed obligated to follow those instructions, because it was not entitled to indemnity for expenses as a wrongfully rejecting buyer.<sup>16</sup> Alternatively, the wrongfully rejecting buyer might erroneously conclude that it is entitled to reimbursement out of the resale proceeds and forward to seller only part of the resale proceeds. Seller would then have to convince buyer that rejection was wrongful, in order to recover the rest of the resale proceeds.

Thus, the 2000 revision of Section 2-603 answers the larger question of the duties of the wrongfully rejecting buyer; the remaining questions will

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The revised section, however, states only the rights of the rightfully rejecting buyer and by omission attempts to imply that the wrongfully rejecting buyer does not have the same rights.

In the 2000 draft, the Prefatory Note states:

Due to time constraints, Preliminary Comments have been prepared only for those sections that are either new or controversial. Other sections contain only limited Reporter's Notes explaining the changes—the Comments for these sections will be based primarily on the Official Comments to current Article 2. For sections where there are either no changes or only minor style changes, the Reporter's Notes state "[t]his section reflects current law."

U.C.C. art. 2, prefatory note (2000 draft). This article cites both as "comments" to the 2000 draft.

12. See U.C.C. § 2-706 (1999).

13. See *id.* § 2-708(1).

14. See *id.* § 2-709.

15. Article 2, its drafting history, applicable cases, and commentary are inconclusive or split as to whether an aggrieved seller can freely elect between §§ 2-706 and 2-708(1) after buyer wrongfully fails to accept. See JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 7-7, at 376-83 (4th ed. Vol. 1 1995) (Practitioner Treatise Series). The 2000 draft states, "Failure of a seller to resell within this section does not bar the seller from any other remedy." U.C.C. § 2-706(g) (2000 draft). Comment 10 to § 2-706 states that "seller is always free to choose between resale and damages for repudiation or nonacceptance under Section 2-708." *Id.* § 2-706 cmt. 10.

16. Comment 1 to § 2-603 in the current Code denotes buyer's resale under subsection (1) as "a salvage sale where the value of the goods is threatened and the seller's instructions do not arrive in time to prevent serious loss." Comment 5 states that a buyer who fails to effect that salvage sale "is subject to damages" under the policies set forth in § 1-106. U.C.C. § 2-603 cmts. 1, 5 (1999). By close analogy, seller's remedy for buyer's failure to follow reasonable instructions under § 2-603 should be the same.

eventually be resolved between the parties as they sort out whether the rejection was in fact wrongful or rightful.

B. BUYER'S REASONABLE USE OF GOODS AFTER  
REJECTION OR REVOCATION

The current Code states that a revoking buyer "has the same rights and duties with regard to the goods involved as if he had rejected them."<sup>17</sup> This broad reference has been understood to apply Sections 2-602 (manner and effect of rejection), 2-603 (merchant buyer's duties as to rejected goods), and 2-604 (buyer's options as to salvage of rejected goods) to revocation situations.<sup>18</sup> Nothing in the 2000 draft disturbs this understanding. In addition, in the 2000 draft, under Section 2-602(b), an aggrieved buyer's duties as to rejected or revoked goods are subject to Section 2-608(d), a new subsection,<sup>19</sup> which states the following:

If a buyer uses the goods after a rightful rejection or justifiable revocation of acceptance, the following rules apply:

- (1) Any use by the buyer that is unreasonable under the circumstances is wrongful as against the seller and is an acceptance only if ratified by the seller.
- (2) Any use of the goods that is reasonable under the circumstances is not wrongful as against the seller and is not an acceptance, but in an appropriate case the buyer shall be obligated to the seller for the value of the use to the buyer.<sup>20</sup>

Comment 7 adds the following explanation:

Subsection (d), which is new, deals with the problem of post-rejection or revocation use of the goods. The courts have developed several alternative approaches. Under original Article 2, a buyer's post-rejection or revocation use of the goods could be treated as an acceptance, thus undoing the rejection or revocation, could be a violation of the buyer's obligation of reasonable care, or could be a reasonable use for which the buyer must compensate the seller. Subsection (d) adopts the third approach. If the buyer's use after an effective rejection or a justified revocation of acceptance is unreasonable under the circumstances, it is inconsistent with the rejection or revocation of acceptance and is wrongful as against the seller. This gives the seller the option of ratifying the use, thereby treating it as an acceptance, or pursuing a non-Code remedy for conversion.

If the buyer's use is reasonable under the circumstances, the buyer's actions cannot be treated as an acceptance. The buyer must compensate the seller for the value of the use of the goods to the buyer. Determining the appropriate level of compensation requires a consideration of the buyer's particular circumstances and should

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17. U.C.C. § 2-608(3) (1999).

18. See, e.g., 2 WILLIAM D. HAWKLAND, *UNIFORM COMMERCIAL CODE SERIES* § 2-608:1 (1998 & Supp. 2000).

19. See U.C.C. §§ 2-602(b), 2-608(d) (2000 draft).

20. *Id.* § 2-608(d).

take into account the defective condition of the goods. There may be circumstances, such as where the use is solely for the purpose of protecting the buyer's security interest in the goods, where no compensation is due the seller. In other circumstances, the seller's right to compensation must be netted out against any right of the buyer to damages.<sup>21</sup>

Section 2-606 on acceptance contains a new cross-reference to this new provision.<sup>22</sup>

The breaching seller's right to the value of buyer's post-rejection or post-revocation use is consistent with the law of restitution (incorporated into the UCC under Section 1-103),<sup>23</sup> some case law,<sup>24</sup> the recommendations of several commentators,<sup>25</sup> and the Magnuson-Moss Warranty Act.<sup>26</sup> In most instances, the breaching seller will be setting off the value of buyer's use against damages or the return of the prepaid purchase price.

Although earlier drafts of a very similar section included wrongful but effective rejections,<sup>27</sup> Section 2-608(d) in the 2000 draft limits the rule to rightful rejections and justifiable revocations, but does not explain the rationale for the scope of the rule.

### C. BUYER'S FAILURE TO PARTICULARIZE DEFECTS

In the current Code, buyer's failure to particularize defects under section 2-605(1) precludes the buyer from relying on that unstated defect to justify rejection or establish breach only if (1) a merchant seller makes a written request of a merchant buyer for a written statement of all defects that triggered the rejection or (2) "seller could have cured it if stated seasonably."<sup>28</sup> The 2000 draft rewords the second point as follows: "where the seller had a right to cure the defect and could have cured it if stated seasonably."<sup>29</sup> Thus, seller must have both the right and the ability to cure. Otherwise, the argument might be made that Section 2-605 cre-

21. *Id.* § 2-608 cmt. 7. This language would be clearer if the fourth and fifth sentences read: "Subsection (d) adopts the third approach as to reasonable use. However, if the buyer's use after an effective rejection or a justified revocation of acceptance is unreasonable. . . ." (additional language underlined).

22. *Id.* § 2-606(a)(3).

23. See DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 5.15(2), at 563-64 (2d ed. 1993).

24. See, e.g., *Page v. Dobbs Mobile Bay, Inc.*, 599 So. 2d 38 (Ala. Civ. App. 1992); *Stroh v. Am. Recreation & Mobile Home Corp.*, 530 P.2d 989, 993 (Colo. Ct. App. 1975).

25. See, e.g., R.J. Robertson, Jr., *Rights and Obligations of Buyers with Respect to Goods in Their Possession After Rightful Rejection or Justifiable Revocation of Acceptance*, 60 IND. L.J. 663, 679-94 (1984); Douglas J. Whaley, *Tender, Acceptance, Rejection and Revocation—The UCC's "TARR"-Baby*, 24 DRAKE L. REV. 52, 65 (1974); Kim Michael La Valle, Note, *Buyer's Continued Use of Goods After Revocation of Acceptance Under the Uniform Commercial Code*, 24 WAYNE L. REV. 1371, 1382 (1978).

26. 15 U.S.C. § 2301(12) (1994); See also WHITE & SUMMERS, *supra* note 15, § 8-3, at 453 n.40 (related FTC developments).

27. See, e.g., U.C.C. § 2-704(b) (Tentative Draft Dec. 1998).

28. U.C.C. § 2-605(1)(a) (1999).

29. U.C.C. § 2-605(a)(1) (2000 draft); cf. U.C.C. § 2-605(1)(a) (1999) ("where the seller could have cured it if stated seasonably").

ates additional instances in which seller can cure, aside from those allowed under Section 2-508 which deals with cure. It does not.<sup>30</sup>

Consistent with the idea that a revoking buyer "has the same rights and duties with regard to the goods involved as if he had rejected them," the 2000 draft extends the scope of Section 2-605 (waiver of buyer's objections by failure to particularize) to cover revocation of acceptance.<sup>31</sup> The 2000 draft further expands Section 2-605's applicability to revocation by enlarging the scope of cure to apply to some revocation situations: non-consumer contracts<sup>32</sup> in which the revocation was based on non-discovery of the nonconformity.<sup>33</sup> Within this set of factual constraints, if cure is possible, buyer must particularize that defect or be barred from relying on it to justify revocation.

However, if buyer revokes acceptance because seller has not cured a defect, the 2000 draft does not give seller a second chance to cure after revocation.<sup>34</sup> Thus, buyer need not particularize defects under subsection (a)(1) after revocation if the revocation was based on seller's failure to cure.<sup>35</sup> However, that same buyer may still have to particularize defects under subsection (a)(2) if both buyer and seller are merchants and if seller makes a written request for a written statement of defects.<sup>36</sup> This addition goes unmentioned in the comment to the 2000 draft of Section 2-605 but is a sensible result, because it continues the policy of treating

30. See U.C.C. § 2-605 cmt. 1 (2000 draft).

31. U.C.C. § 2-605(a) (2000 draft) states:

The buyer's failure to state in connection with rejection a particular defect or in connection with revocation of acceptance a defect that justifies revocation precludes the buyer from relying on the unstated defect to justify rejection or revocation of acceptance if the defect is ascertainable by reasonable inspection:

(1) where the seller had a right to cure the defect and could have cured it if stated seasonably; or

(2) between merchants when the seller has after rejection or revocation of acceptance made a request in a record for a full and final written statement of all defects on which the buyer proposes to rely.

32. A "consumer contract" is a "contract between a merchant seller and a consumer." U.C.C. § 2-102(a)(12) (2000 draft). A "consumer" is "an individual that buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for personal, family, or household purposes." *Id.* § 2-102(a)(11). This definition means that a contract in which both buyer and seller are consumers is a "non-consumer contract" and therefore subject to cure after a revocation that is based on non-discovery of the nonconformity. However, that result is contrary to the following statement in § 2-605 cmt. 1 (2000 draft): "[B]ecause the right to cure following revocation of acceptance is restricted under Section 2-508 to nonconsumer contracts, this section cannot be asserted against a consumer who is seeking to revoke acceptance."

33. See U.C.C. §§ 2-508, 2-608(a)(2) (2000 draft). For further discussion of this change, see Patricia A. Tauchert, *A Survey of Part 5 of Revised Article 2*, 54 SMU L. REV. — (2001).

34. See U.C.C. § 2-508 (2000 draft) (limiting cure after revocation to instances in which buyer accepted the goods "without discovery of such nonconformity if the buyer's acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances," per § 2-608(a)(2)).

35. See *id.* § 2-605 cmt. 1.

36. *Id.* § 2-605 cmt. 1 does not note this latter possibility. This omission is remedied in the edited comment in text accompanying *infra* note 43.

rejections and revocations alike, insofar as it is possible and justifiable. There is no reason to deny a merchant seller an itemized statement of defects from a merchant buyer who has revoked acceptance of the goods, as long as the same statement is available when the goods have been rejected.<sup>37</sup>

As to either rejection or revocation, buyer's failure to particularize a defect precludes buyer from using this defect to justify rejection or revocation. However, the 2000 draft, would no longer bar the buyer from establishing breach to obtain other remedies.<sup>38</sup> After all, the rationales for requiring buyer to particularize defects as to rejected goods are to enable seller to cure, to enable seller to resolve a dispute about an alleged defect, to deter buyers from bad-faith rejections, and to give seller the ability to police the buyer's damages claim.<sup>39</sup> If buyer instead has accepted the defective goods, buyer must give notice of breach (but not defects)<sup>40</sup> under Section 2-607.<sup>41</sup> However, if that same buyer then revokes acceptance and falls within either of the instances for particularizing defects, the buyer must state the defect discovered after acceptance, in order to use that defect to justify revocation.<sup>42</sup>

In the 2000 draft, the last paragraph of comment 1 accompanying Section 2-605 could use some tightening up, for clarity and for consistency with the points made above. Recommended additions and deletions are shown below in italics and strikeout:

Subsection (a) as revised has been extended to include not only rejection but also revocation of acceptance. This is necessitated by the expansion of the right to cure (Section 2-508) to cover revocation of acceptance in nonconsumer contracts. The application of the subsection to revocation cases is limited in the following ways: (1) because a revocation under Section 2-608(a)(1) does not trigger a right to cure under Section 2-508, such a revocation does not trigger Section 2-605(a)(1), *but it could trigger Section 2-605(a)*; (2) *if there is the requisite written request between merchants* because Section 2-

37. "When the time for cure is past, subsection (1)(b) makes it plain that a seller is entitled upon request to a final statement of objections upon which he can rely." U.C.C. § 2-605 cmt. 3 (1999).

38. Compare U.C.C. § 2-605(1) (1999) ("precludes him from relying on the unstated defect to justify rejection or to establish breach") with U.C.C. § 2-605(a) (2000 draft) ("precludes the buyer from relying on the unstated defect to justify rejection or revocation of acceptance").

39. See U.C.C. § 2-605 cmts. 1, 2 (1999).

40. *Id.* § 2-607 cmt. 4 states as follows:

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). . . . The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

41. See U.C.C. § 2-605 cmt. 1 (2000 draft).

42. See *id.* § 2-605.



608(a)(2) involves defects that are by definition difficult to discover, there is no waiver under Section 2-605(a) unless the defect at issue justifies the revocation and the buyer has notice of it; and (3) because the right to cure following revocation of acceptance is restricted under Section 2-508 to nonconsumer contracts *and because Section 2-605(a)(2) applies only between merchants*, this section cannot be asserted against a consumer who is seeking to revoke acceptance. The consequences of a consumer's failure to give proper notice are governed by Section 2-607(c) *as to accepted goods and Section 2-602(a) as to goods subject to buyer's attempt to reject or revoke acceptance*.<sup>43</sup>

These changes clarify the related sections for some of the subsection references, the relationship between various combinations of consumers and merchants, and the relationship between the notices for accepted goods versus rejected or revoked goods.

#### D. NOTICE OF BREACH AS TO ACCEPTED GOODS

Under Section 2-607 of the current Code, a buyer who has accepted the goods "must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."<sup>44</sup> This provision has been the subject of scholarly criticism because of its harshness in completely barring the remedies of a buyer who fails to give timely notice.<sup>45</sup> The 2000 draft instead states that "buyer must . . . notify the seller; however, failure to give timely notice bars the buyer from a remedy only to the extent that the seller is prejudiced by the failure."<sup>46</sup> The accompanying Comment states that the change means that

a failure to give timely notice is reduced to a prejudice rule instead of an absolute bar to any recovery as under the original provision. A Comment will specify that the buyer must be in good faith in not giving notice, and that the buyer cannot come back after the buyer's own default and claim that the seller was in breach.<sup>47</sup>

Although both the current Code and the 2000 draft place the burden "on the buyer to establish any breach,"<sup>48</sup> the 2000 draft places on the seller the burden to show to what extent it was prejudiced by the buyer's

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43. *Id.* § 2-605 cmt. 1 (edits added by author); *see also supra* note 32, which raises an additional inconsistency.

44. U.C.C. § 2-607(3)(a) (1999); *see also supra* note 40 for the text of an accompanying comment.

45. *See generally* John C. Reitz, *Against Notice: A Proposal to Restrict the Notice of Claims Rule in U.C.C. 2-607(3)(a)*, 73 CORNELL L. REV. 534 (1988).

46. U.C.C. § 2-607(c)(1) (2000 draft). This provision states in full:

Where a tender has been accepted

(1) the buyer must within a reasonable time after the buyer discovers or should have discovered any breach notify the seller; however, failure to give timely notice bars the buyer from a remedy only to the extent that the seller is prejudiced by the failure.

47. U.C.C. § 2-607 cmt. (2000 draft).

48. U.C.C. § 2-607(4) (1999); U.C.C. § 2-607(d) (2000 draft).

failure to give notice of breach. Buyer's failure to give notice might prejudice seller in ways unrelated to buyer's damages, for example, preventing seller from "pass[ing] liability for breach on to suppliers or carriers because of [the] expiration of the applicable limitations period"<sup>49</sup> or preventing seller from "avoid[ing] similar liability to other buyers of the same or similar products."<sup>50</sup> However, by far the most likely prejudice to seller is liability for all or part of buyer's damages claimed under Section 2-714, which seller might have been able to avoid by negotiating a settlement with buyer (perhaps of a money allowance, repair, or replacement) or by examining the defective goods to determine to what extent they were actually nonconforming upon tender or receipt, failed to live up to seller's promises as to future performance, or had been damaged by buyer's inappropriate use, failure to follow instructions, or other negligence.

If the goods have been disposed of (by buyer's sale or by destruction) and are no longer available for seller's examination, the seller might be able to claim complete prejudice if it has no separate basis for contesting the buyer's proof of the breach (assuming, of course, that the buyer can meet its burden of establishing the breach, based on evidence taken before the goods became unavailable for examination). If buyer still has the goods, the seller might be prejudiced by its difficulty in determining whether or to what extent buyer tampered with the goods. If the buyer has continued to use the goods, the seller might have a hard time showing the extent to which the alleged defects were caused by buyer's continuing use (or misuse).

However, some of these proof problems could be alleviated if a court is willing to decrease the buyer's damages by the amount that the goods *might have* deteriorated between the time seller should have received notice and the time seller did finally receive notice (perhaps upon notice of litigation). One commentator, Professor Reitz, has proposed that

[a]ny lingering concerns about the possibility of prejudice from loss of evidence can be eliminated by granting the seller a rebuttable presumption that specific evidence the seller lost as a result of the buyer's delay would have refuted the buyer's claim. . . . The seller could not claim the presumption unless it could prove that, as a result of the buyer's delayed notice, it lost the chance to obtain or preserve a specific source of evidence relevant to the breach issue that the seller would not normally have obtained or preserved in the absence of a dispute. . . . The factfinder could weigh that presumption against the credibility of the buyer's [evidence].

This approach concedes that the mere loss of potentially significant evidence is a prejudice to the seller but avoids the extreme of shielding the seller from liability in cases in which the available evidence strongly indicates that the seller did breach. The presumption formalizes whatever

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49. Reitz, *supra* note 45, at 558.

50. *Id.*

negative inference a factfinder would draw when the buyer's delay in giving notice prevents the seller from obtaining potential rebuttal evidence. Although this approach still overprotects the seller by giving the seller the benefit of a presumption even when the available evidence indicates that the seller in fact breached, it also allows the trier of fact to consider whether the available evidence overcomes the presumption. The alternative of requiring the seller to prove actual harm from loss of evidence would pose an impossible burden of proof for the seller, and the alternative of requiring the seller to demonstrate a likelihood that lost evidence would have supported the seller's defense would in effect require the court to decide the case on the basis of the available evidence anyway, thus eliminating any protection from the potential prejudice. Requiring the seller to identify specific sources of lost evidence, on the other hand, does not unduly burden the seller because the seller should be able to identify the sources of evidence it could have obtained if notified earlier.<sup>51</sup>

The addition of comment language affirming Professor Reitz's idea of a rebuttable presumption would alleviate the unfairness to a seller who has been prejudiced by buyer's delay in depriving seller of a valuable opportunity to obtain evidence.

Subsection 2-607(5) in the current Code covers buyer's notice about being "sued for breach of a warranty or other obligation for which his seller is answerable over."<sup>52</sup> In the 2000 draft, the vouching in process in Section 2-607(e) applies when "buyer is sued for indemnity, breach of a warranty or other obligation for which another party [including seller] is answerable over."<sup>53</sup> This revision reflects the increased contractual use of indemnification, third-party warranties, the duty to defend, and other similar contractual provisions.<sup>54</sup>

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51. Reitz, *supra* note 45, at 568-69 (footnotes omitted).

52. U.C.C. § 2-607(5) (1999).

53. U.C.C. § 2-607(e) (2000 draft). The whole provision states as follows:  
Where the buyer is sued for indemnity, breach of a warranty or other obligation for which another party is answerable over

(1) the buyer may give the other party notice of the litigation in a record. If the notice states that the other party may come in and defend and that if the other party does not do so it will be bound in any action against it by the buyer by any determination of fact common to the two litigations, then unless the other party after seasonable receipt of the notice does come in and defend it is so bound.

(2) if the claim is one for infringement or the like the original seller may demand in a record that its buyer turn over to it control of the litigation including settlement or else be barred from any remedy over and if it also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

54. A comment to a previous draft of the same section adds clarification:  
Vouching in does not confer a right on the party notified to intervene, does not confer jurisdiction of any kind on the court over the person answerable over, and does not create a duty to defend on the part of the person answerable over. Those matters continue to be governed by the applicable rules of civil procedure and substantive law outside this section. Vouching in is based

## E. INSTALLMENT CONTRACTS

In the 2000 draft, the definition of "installment contract" has been moved from Section 2-612(1) to Section 2-102(a)(28), as part of the collection of Article 2 definitions.

In addition, both subsections of Section 2-508 on cure are revised to include explicit references to rejection under either Section 2-601 (non-installment contracts) or Section 2-612 (installment contracts).<sup>55</sup> This change is consistent with existing case law and commentary.<sup>56</sup>

In the 2000 draft of Section 2-612 on installment contracts, the phrase "to the buyer" is added to (a) and (b): "(a) [T]he buyer may reject any installment that is nonconforming if the nonconformity substantially impairs the value of that installment *to the buyer* . . . . (b) Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract *to the buyer* . . . ."<sup>57</sup> These additions clarify that the "substantial impairment" test of Section 2-612 is meant not to be a purely objective test based on the needs of the usual buyer or even seller's knowledge about buyer's needs at the time of contract formation. This result is consistent with a comment of the current Code,<sup>58</sup> current commentary,<sup>59</sup> the Restatement factors determining whether a breach is material,<sup>60</sup> and the standard for revocation of acceptance.<sup>61</sup> Section 2-608 on revocation of acceptance includes "to the buyer" in both the current Code and the 2000 draft.<sup>62</sup> The comment to the current Code states as follows:

the test is not what the seller had reason to know at the time of contracting; the question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances.<sup>63</sup>

This test does not mean that buyer can revoke acceptance based solely on personal dissatisfaction, but it does allow buyer to prove "his own special needs and the particular use to which he intended to put the

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upon the principle that the person answerable over is liable for its contractual obligations regarding the quality or title to the goods which the buyer is being forced to defend. U.C.C. § 2-707 cmt. 7 (Tentative Draft Dec. 1998).

55. U.C.C. § 2-508(a), (b) (2000 draft).

56. See HAWKLAND, *supra* note 18, § 2-612:3 & n.2; WILLIAM H. LAWRENCE & WILLIAM H. HENNING, UNDERSTANDING SALES AND LEASES OF GOODS § 7.04[E], at 217 (1996).

57. U.C.C. § 2-612 (2000 draft) (emphasis added).

58. See U.C.C. § 2-612 cmt. 4 (1999) ("Substantial impairment of the value of an installment . . . must be judged in terms of the normal or specifically known purposes of the contract.").

59. See HAWKLAND, *supra* note 18, § 2-612:3 & n.3; WHITE & SUMMERS, *supra* note 15, § 8-3.

60. See RESTATEMENT (SECOND) OF CONTRACTS § 241 (1979).

61. See U.C.C. § 2-608(1) (1999) ("non-conformity substantially impairs its value to [buyer]").

62. U.C.C. § 2-608(a) (2000 draft).

63. U.C.C. § 2-608 cmt. 2 (1999).

goods.”<sup>64</sup> Usually, this test involves comparing the dollar value of the defect (as measured by the particular credible needs of the buyer) with the price paid for the goods. If the defect can be corrected, its dollar value is simply the cost of effecting the cure. Whether that cost is sufficiently substantial to permit the buyer to revoke acceptance, as opposed to recovering the cost by way of damages, depends upon its magnitude as compared to the price of the goods, and has nothing to do with the financial resources of the particular buyer.<sup>65</sup>

If Sections 2-608 and 2-612 use the same language (“substantially impairs the value of the goods to the buyer”), the considerably more extensive cases and commentary concerning Section 2-608 will be available to clarify that same language in Section 2-612.

#### F. ANTICIPATORY REPUDIATION

The 2000 draft of Section 2-610 clarifies that repudiation includes “language that a reasonable party would interpret to mean that the other party will not or cannot make a performance still due under the contract,” as well as “voluntary, affirmative conduct that would appear to a reasonable party to make a future performance by the other party impossible.”<sup>66</sup> This clarification is based on the Restatement (Second) provision on repudiation,<sup>67</sup> which states:

A repudiation is (a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for a total breach under § 243, or (b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.<sup>68</sup>

However, it may actually be a bit narrower than a comment in the current Code, which states that “[i]t is not necessary for repudiation that performance be made literally and utterly impossible. Repudiation can result from action which reasonably indicates a rejection of the continuing obligation.”<sup>69</sup> The question left open by the 2000 draft is whether an action (not a statement) indicating obligor is unwilling (but not unable) to perform is still a repudiation, as it is under the current Code.<sup>70</sup>

#### G. CONTRACT AVOIDANCE, TERMINATION, AND LAPSE

In the current Code, the consequence of meeting the requirements of Section 2-613 on casualty losses is that the contract is “avoided,” as a

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64. HAWKLAND, *supra* note 18, § 2-608:2, at art. 2-130.

65. *Id.* art. 2-131.

66. U.C.C. § 2-610(b) (2000 draft).

67. U.C.C. § 2-613 cmt. 1 (1996) states that the “working but not exclusive definition of repudiation [is] taken from § 250 of the Restatement, Second of Contracts.”

68. RESTATEMENT (SECOND) OF CONTRACTS § 250 (1979).

69. U.C.C. § 2-610 cmt. 2 (1999).

70. See HAWKLAND, *supra* note 18, § 2-610:2.

whole or in part.<sup>71</sup> The 2000 draft instead states that the contract is “terminated,” as a whole or in part, in order to preserve pre-termination breaches that otherwise might be wiped out if “avoidance” is taken to mean rescission of the contract. Termination is defined as occurring when “either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach.”<sup>72</sup> The effect of termination is that “all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.”<sup>73</sup>

A similar change is made in Section 2-616, which sets out the procedure on notice claiming excuse. The current Code states that the “contract lapses” when the buyer does not agree to modify the contract according to seller’s proposed substitute quota.<sup>74</sup> The 2000 draft instead states, “the contract is terminated.”<sup>75</sup>

#### H. SCOPE OF IMPRACTICABILITY EXCUSE

Section 2-615 on the excuse of impracticability is expanded from a “[d]elay in delivery or non-delivery” in the current Code to a “[d]elay in performance or nonperformance” in the 2000 draft.<sup>76</sup> The same change in terminology is made in the next section on the procedure for claiming excuse.<sup>77</sup> This change allows sellers to use the impracticability excuse with regard to all of their obligations, not just the obligation of delivery.<sup>78</sup>

#### I. CONCLUSION

The changes to Part Six in the 2000 draft to U.C.C. Article 2 are useful changes that are consistent with existing law or clear up existing problems. Aside from some minor edits in text and some additions to comments, this part of the draft is ready for adoption by NCCUSL.

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71. U.C.C. § 2-613 (1999).

72. *Id.* § 2-106(3); U.C.C. § 2-102(a)(38) (2000 draft).

73. U.C.C. § 2-106(3) (1999); U.C.C. § 2-106 (2000 draft).

74. U.C.C. § 2-616(2) (1999).

75. U.C.C. § 2-616(b) (2000 draft). The comments accompanying the draft state that the current Code uses the term “avoidance,” but that is incorrect. The current Code uses the term “lapse.”

76. U.C.C. § 2-615(a) (1999); U.C.C. § 2-615(1) (2000 draft).

77. *See* U.C.C. § 2-616 (1999); U.C.C. § 2-616 (2000 draft).

78. *See* U.C.C. § 2-615 cmt. (2000 draft).

